

SOUTH CAROLINA PUBLIC SERVICE COMMISSION

HEARING OFFICER DIRECTIVE

DOCKET NO. [2017-370-E](#), [2017-207-E](#), and [2017-305-E](#) ORDER NO. 2018-103-H

AUGUST 3, 2018

David Butler
Hearing Officer

DOCKET DESCRIPTION:

Joint Application and Petition of South Carolina Electric & Gas Company and Dominion Energy, Incorporated for Review and Approval of a Proposed Business Combination between SCANA Corporation and Dominion Energy, Incorporated, as May Be Required, and for a Prudency Determination Regarding the Abandonment of the V.C. Summer Units 2 & 3 Project and Associated Customer Benefits and Cost Recovery Plans

Friends of the Earth and Sierra Club, Complainant/Petitioner v. South Carolina Electric & Gas Company, Defendant/Respondent

Request of the Office of Regulatory Staff for Rate Relief to South Carolina Electric & Gas Company's Rates Pursuant to S.C. Code Ann. § 58-27-920

MATTER UNDER CONSIDERATION:

Motion to Admit Deposition Testimony from These and Other Proceedings as Evidence

HEARING OFFICER ACTION:

The Office of Regulatory Staff (“ORS”) moves that an Order be issued permitting the use of any transcripts and/or videos of depositions taken in these proceedings and in related cases to be admitted as evidence at the hearing on the merits in these proceedings. Objections would be preserved at the time of each deposition, except as to the form of the question, and would be raised in response to the introduction of deposition testimony in the proceeding. In a late-filed document, ORS clarifies that it is asking the Commission to rule that any deposition testimony that would otherwise be admissible under S.C. Rule of Evidence 804 (b) (1) when the deponent is unavailable to testify at the hearing will be admissible in these proceedings even if the witness is actually “available” to testify in person. Further, ORS later noted that it was primarily referring to depositions taken in other proceedings where opposing counsel from South Carolina Electric & Gas Company (“SCE&G”) have been permitted to attend and defend SCE&G’s interests. However, this

ruling applies to both depositions taken in these proceedings and depositions taken in other proceedings where opposing counsel from SCE&G have attended and defended the Company's interests. SCE&G and Dominion Energy, Inc. ("Dominion") (together, the "Joint Applicants") oppose the ORS Motion, stating that neither the Commission Regulations, nor the applicable South Carolina Rules of Evidence support such a holding. The Joint Applicants also note that ORS has not identified the specific witnesses whose testimony it seeks to admit, and that ORS requests a "blanket rule" on admission of deposition testimony.

This Hearing Officer recognizes that these consolidated Docket proceedings present a number of challenges for the parties and for the Public Service Commission of South Carolina ("the Commission"). The major challenge is how to conduct the trial of the case, deliberate, and issue an Order while meeting the statutory timeframe. ORS quotes 10 S.C. Code Ann. Regs. 103-846, which allows receipt of any part of the evidence in written form when a hearing will be expedited and the interests of the parties will not be prejudiced substantially. ORS also discusses various other Rules which allow admission of deposition testimony into evidence under different circumstances. Under the ORS proposal, the Commission's Order would allow admission of these depositions into evidence without consideration of at least one determinative factor found in the Rules of Evidence, which is witness unavailability.

10 S.C. Code Ann. Regs. 103-835 holds that the South Carolina Rules of Civil Procedure ("SCRCP") govern all discovery matters not covered in Commission Regulations. Accordingly, Rule 32 SCRCP specifically governs the use of depositions in Court proceedings. Rule 32 sets out specific criteria, and allows admission of depositions into evidence under specific circumstances, including the non-availability of a witness. I would note that Central Electric Power Cooperative, Inc. ("Central") and The Electric Cooperatives of South Carolina, Inc. ("ECSC") support the request that ORS be allowed to use depositions in the hearing as allowed by Rule 32 of the South Carolina Rules of Civil Procedure ("SCRCP") and the various rules of evidence cited by the ORS Motion.

Further, as pointed out by Central and ECSC, there are well developed legal requirements that apply to the use of depositions in trials or hearings, even if the depositions were initially taken in other proceedings. One of these requirements is the unavailability of a witness, unless an exception applies under the Rules. Although Commission Regulation 103-846 certainly allows receipt of evidence in written form if a hearing will be expedited and the interests of the parties will not be prejudiced substantially, it is not so broad as to eliminate the applicability of Rule 32 SCRCP or other Rules as to the necessity of the unavailability of a witness before admission of a deposition into evidence, unless an exception applies under the Rules. It would appear to this Hearing Officer that if ORS or other parties can meet all legal requirements as laid out in the authorities discussed by the Parties, then the depositions would be allowed to be used for any appropriate purpose in these proceedings, including admission into evidence. Further,

considering the admirable goal of the motion, i.e., easing the time constraints that ORS cites as the reason for its request, this Hearing Officer believes that he can grant the motion to this limited extent: to wit, even if a witness is available, in the absence of objection, such witnesses' depositions may be admitted regardless of the availability of the declarant. This is appropriate on the basis of S.C. Code Ann. Regs. 103-846 that states that the interests of the parties must be taken into account when considering whether to take evidence in written form ("when a hearing will be expedited and the interests of the parties will not be prejudiced substantially, any part of the evidence may be received in written form.")

However, absent such agreement, which this Hearing Officer strongly encourages the parties to consider, it appears that a deposition-by-deposition examination into the question of admissibility is required in this case.

10 S.C Code Ann. Regs. 103-846 (A) clearly states that the Commission is required to follow the rules of evidence as applied in civil cases in the Court of Common Pleas. Granting the ORS Motion would be tantamount to admitting hearsay evidence, which is not admissible unless it falls under one of the exceptions to non-admissibility. South Carolina Rules of Evidence ("SCRE") 802. SCRE 804 (b) (1) creates a hearsay exception for former testimony or testimony taken in a deposition in the same or another proceeding. However, prior testimony is only admissible when the declarant is unavailable and when the party against whom the testimony is offered had "opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." SCRE 804 (b) (1). ORS has not identified the specific testimony sought to be used, the specific witnesses providing that testimony, or the depositions in which that testimony was given, and under what circumstances, although ORS has stated that the depositions in question would be those where SCE&G has had the opportunity to participate. Accordingly, although the Commission may certainly receive evidence in written form under appropriate circumstances, the Regulation does not authorize the Commission to disregard the rules of evidence and civil procedure, or the general prohibition against hearsay by doing so.

For these reasons, the request for a ruling admitting all designated depositions into the evidence of these proceedings without regard to witness availability is denied, other than as set out above (i.e., in the absence of objection). However, such depositions may be admitted into evidence in whole or in part if such admission would be in compliance with the South Carolina Rules of Civil Procedure and the South Carolina Rules of Evidence governing such admission, which necessarily requires consideration of each deposition on a case-by-case basis. Certainly, when the parties have completed all depositions either in these proceedings or related to these proceedings, ORS or any party desiring to have deposition testimony admitted into the record of these proceedings may file an appropriate Motion requesting such relief at least twenty (20) days prior to the commencement of the hearing. The Motion should contain a list of the depositions to be considered for admission, and why ORS believes that the depositions are admissible as a whole or in part. Within five (5) days, opposing or supporting parties may file responses to the ORS Motion. ORS then

has two (2) days to file a reply to the responses. I would request that ORS or any other party so moving consult with the other parties to the case in order to attempt to obtain a consensus on such a Motion prior to filing. If such a consensus is not reached, copies of the depositions or portions of depositions in controversy should be furnished to the Hearing Officer for examination and determination as to admissibility at the time that the ORS Motion is filed with the Commission. If the parties believe that a conference or hearing would be helpful to the Hearing Officer in resolving issues of admissibility, such a conference or hearing may be requested by any party.

In summary, individual deposition testimony from other related proceedings may be considered for admission into evidence by utilizing the procedure discussed herein, where the parties do not agree on the admissibility of such evidence into the record of the present proceeding.